December 17, 2009

OFFICE OF THE HEARING EXAMINER
CITY OF RENTON

REPORT AND DECISION

APPELLANT:

Diane Miller
1814 SE 21st Place
Renton, WA 98055

Mark Barber
Warren, Barber & Fontes
Sr. Assistant City Attorney
Renton, WA 98057
Representing: City of Renton
Marilyn Kamcheff
Code Compliance Inspector
Renton, WA 98057

Miller Unfit Dwelling Appeal
File No.: **LUA 09-097, AAD/C09-0279**

PUBLIC HEARING:

After reviewing the Appellants' written requests for a hearing and examining available information on file, the Examiner conducted a public hearing on the subject as follows:

MINUTES

The following minutes are a summary of the October 20, 2009 hearing.
The legal record is recorded on CD.

The hearing opened on Tuesday, October 20, 2009, at 9:00 a.m. in the Council Chambers on the seventh floor of the Renton City Hall. Parties wishing to testify were affirmed by the Examiner.

Parties present:

Mark Barber, Sr. Assistant City Attorney

Marilyn Kamcheff, Code Compliance Officer
City of Renton

Kirk Davis, Attorney for Appellant

Diane Miller, Appellant

The following exhibits were entered into the record:

Exhibit No. 1: Yellow file containing the original	**Exhibit No. 2:** Transcript the Hearing Below

appeal, the decision in the appeal and the appeal to Hearing Examiner, as well as other documentation.	

There were no preliminary matters.

Mr. Barber stated that the City did not intend to present testimony from any persons present today, but to rely on the record for the Director below.

Mr. Davis stated that he had just received the transcript in this matter yesterday. He had sent a copy to Mr. Barber and filed the original with the Examiner.

It was evident that the Examiner had reviewed the material on this matter and looked at the record. The points on appeal are well spelled out in the Motion that was filed to dismiss the Complaint. Exhibit 1 in the hearing before the Director was not offered nor admitted, that is verified in the transcript, in the City's case. In Administrative Hearings, the rules of evidence are relaxed especially with regards to hearsay, the Director naturally considers those matters. In the Renton Municipal Code, 1-3-5, Section F2 indicates that the hearing shall be governed by the civil rules of Superior Court, but the strict rules of evidence shall not be applied.

There needs to be a basic fairness to the process. It was their contention that when a document or exhibit is marked but not admitted it is essentially that the Director is considering evidence that was not admitted and it does not give the opponent to that evidence a chance to object to the evidence, a chance to cross examine in regards to that evidence because there was no proffer of the evidence. This procedure violated due process.

The Examiner asked if the evidence was discussed at the hearing. It was presumed that there was a basis for the City's unfit order and that in the proceeding there was argument against that decision based on neighbors' testimony or submissions by neighbors, it is not like the appellant was oblivious to the record that existed.

In order to prepare for this hearing, someone must have come in and spent some time in reviewing the file. The appellant knew that the City was concerned about the shape of this building, the City issued certain orders regarding this building, the appellant was obviously aware of that and came in to protest that and check out the information the City had. The appellant was not totally oblivious to the record of some kind prior to the hearing. There was a record that someone dealt with, whether it was officially entered or not may not be relevant.

How did Exhibit 1 being marked and was available at the hearing but not being entered into the record at that precise time prejudice your client?

Mr. Davis stated that they did, at the time Exhibit 1 was being mentioned, not know what was in it. After getting Exhibit 1 and looking at it later, they understood the situation.

When an exhibit is marked and not admitted into evidence, it is not evidence. It prejudiced the client, it is not something that can just be pulled out of the air, it certainly prejudiced his client because he was waiting for an

offer of that evidence before he cross examined anyone on it. He did cross examine people at the hearing, but not on Exhibit 1.

He was waiting for the exhibit to be offered into evidence to go through that exhibit because they did not know what exactly was in that exhibit. He was deprived of the ability to object to any parts of that record because it was never offered into evidence and they had no idea of exactly what was in the exhibit. The hearing was to be a fact finding hearing.

The Examiner asked if it did find facts, there was testimony and there was an opportunity to cross examine. This was an administrative proceeding where strict rules of evidence and law are not necessarily complied with other than as indicated in code. Cross examination is allowed but sometimes it is relaxed and dealt with through the Examiner, it may even be suspended if it seems inappropriate, this is an administrative process, it is not a court of law, the procedures are relaxed. Whether it was officially admitted or marked, it was at the hearing, people were basing a lot of things upon it or what was in it and the Director based his decision on a lot of the testimony he heard. There was testimony about the nature of the building, how long it had been unfit, how long it had been abandoned, testimony from Mr. Miller and his purchase of lumber and his attempts to fix the building but because of financial help or other constrains not being able to get to it. Those are the things that the Director relied on to make the decision. This hearing and that hearing were both administrative and not jury trials or trials before a judge where strict rules of evidence are complied with.

Mr. Davis stated that when a decision is reached there must be some basis for that decision and it has to be based upon evidence that has been admitted. A large part of this exhibit does not apply to Diane Miller, it applies to Robin Miller. It does apply to the property and home.

The Examiner stated that it does not matter who owns the home whether jointly or singly, the home is determined to be unfit by a lot of testimony and by the Director. Diane Miller was not even at the proceeding below. He will go over the Director's decision again, see what he decided and relied upon in reaching his decision and whether or not Exhibit 1, marked and not admitted was relevant or not.

Mr. Davis pointed out that the Renton Municipal court document was totally irrelevant with regards to the administrative action. Exhibit 1 was relevant because there was no other evidence of personal service of the complaint without the admission of this Exhibit 1. There would have been no jurisdiction to go ahead with the hearing while the code requires that, they did object to jurisdiction at the hearing. Oaths need to be administered individually, codes indicate that rules of superior court need to be followed. It was a clear violation of the rule, the witnesses were not administered oaths individually. There is no knowledge of when the witnesses testified if they were actually in the room at the time the oath was administered by just looking at the record. Ms. Kamcheff was asked by the Director if she had been sworn in and she indicated that she had. Her testimony would be okay in that event. The other witnesses were not asked that question by the Director and so would be a violation of the City Code.

They further take issue with some of the conclusions reached by the Director, whether the house should be demolished or repaired (page 9 of 14 of Director's Decision, paragraph 7) the Director indicates that the City of Renton Building Official testified that repairs needed would be extensive with everything above foundation needing to be repaired or replaced. The cost of repairs would exceed 50% of the value of the current structure based on the assessed value for tax purposes. Mr. Davis did not find any testimony where it stated that the cost

of repairs would exceed 50% of the value of the current structure. It is not clear whether the testimony of Mr. Meckling was taken under oath or not, there is nothing in the record to support that conclusion.

Mr. Miller wants to repair this structure, when he and his wife are given ultimatums by the City to stop work and to destroy the structure, all progress is stopped. The previous attorney sent a letter to Ms. Kamcheff requesting clarification, there was never any response to that letter. There was an Order to Correct issued at the same time as an Order to Demolish, the letter to Ms. Kamcheff was to request clarification as to whether or not they could proceed with correction.

Finally, the Millers feel that their property was previously in King County, the City of Renton annexed the property and this process was immediately started. The Millers feel that they have never been given the opportunity to bring their property into compliance.

Mr. Barber stated that the Director's decision should be given substantial weight as provided in the Renton Municipal Code. After review of the evidence and file, the decision of the Director was not erroneous. The Director's file (Exhibit 1) not admitted into evidence appears to be a last argument, in court a Judge is permitted to take judicial notice of the court file. In a trial all pleadings in that court file are not admitted into evidence. Administratively in this instance, Exhibit 1 is the Director's file and it is similar to a court file, it is where the documents are filed.

The City by RMC 1-3-5F2 does have the burden of demonstrating by a preponderance of evidence that a violation has occurred and required corrective action is reasonable. The City has met that burden.

The transcript was provided to the Hearing Examiner and he would have an opportunity to review that transcript and determine whether or not the witnesses were under oath. This point was made by the appellant and is hyper technical for an administrative proceeding, it is normal to have persons raise their hands and be sworn in at the beginning of the hearing if they intend to present testimony. The code does state that the hearing shall be governed by the rules of Superior Court for the State of Washington, but that does not change the character of the administrative hearing and turn it into a court hearing.

All evidence produced before the Director is to be considered that includes all oral testimony. Regarding the issue of not having sufficient time to deal with the structure, this structure has been in this dilapidated condition for at least 15 years. The neighbors have been complaining the structure is not getting any better. It is clear from Mr. Meckling's testimony, the structure is dilapidated to such an extent that it is subject to demolition.

There is some confusion between the Order to Demolish versus the Order to Correct by Mrs. Miller's previous attorney. The Order to Demolish may be the decision that was rendered by the Examiner with regard to Mr. Miller's appeal, which sustained the Director's decision to demolish the structure. However, with regard to the Order to Correct that was issued to Mrs. Miller because the City wished to see that she had her due process rights and the City was unaware that she was a co-owner of the property initially and so she was not named along with Mr. Miller in the initial proceeding. The Order to Correct provided that she could within 30 days submit approved building plans for the repair of the dwelling and within 90 days of the date if the plans were approved, construction and required inspection would have to be completed and approved. The date of that document was April 14, 2009. Mrs. Miller did nothing.

Mr. Davis stated that what was marked as Exhibit 1 at the hearing before the Director, he was given a copy of that at the end of the hearing, there was no proof of personal service on Diane Miller, which was required in the Renton City Code unless it can be shown that personal service cannot be obtained. There was an indication that the declaration of personal service from the officer was in Exhibit 1, and he was unable to find that in his copy. He does have a declaration of service from Donna Locher indicating that it was sent by First Class mail with Return Receipt Requested.

Hearing Examiner stated that the top of page 8 of 14 in Finding 1 states the complaint was served to Robin Miller the husband of Diane Miller by Officer Gould on May 28, 2009. Robin Miller testified in the hearing that he personally delivered the notice to Diane Miller regarding the scheduled hearing and associated date.

Mr. Davis stated that that testimony by Mr. Miller came after the City has rested. The case had been moved for dismissal. Mr. Davis stated that he first saw the file the morning of the hearing and had not had an opportunity to thoroughly review the file. In a hearing evidence must be stated, properly marked and admitted, if that is not the entire file, then what else is out there and there is no chance to object to that.

The Examiner will go through Mr. Watts decision and see what exactly he relied on. A lot of it was the testimony at the hearing.

The **Examiner** called for further testimony regarding this project. There was no one else wishing to speak, and no further comments from staff. The hearing closed at 9:55 a.m.

FINDINGS, CONCLUSIONS & RECOMMENDATION

FINDINGS:

1. The appellant, Diane Miller, filed an appeal of decision finding a residence an unfit building and ordering that it be demolished.

2. The appeal was filed in a timely manner.

3. The appellant owns property located at 16855 125th Avenue SE in Renton, Washington. The property is a single family home.

4. The home is located in the City of Renton. The property was annexed to the City in March 2008. Prior to annexation the property was under the jurisdiction of King County.

5. The appellant and her husband co-own the property. Originally, an order to demolish this same property was issued to appellant's husband and he appealed that order. That appeal was denied in a prior proceeding. Since that order was issued, the City determined that it should have included Diane Miller the co-owner of that same house. Since the City failed to notify Diane Miller at that time, it brought a separate action against her and a similar order to demolish the home was issued by the Director.

6. The appellant Diane Miller did not attend the hearing. She was represented by counsel and her husband Robin Miller did attend the hearing. It was agreed that the home is in a state of serious disrepair. Robin Miller testified that he wanted to bring it back up to code but with a pending order of demolition, he did

not want to expend time and money under ambiguous circumstances and potentially see the home demolished.

7. Mr. Davis is the attorney representing Diane Miller in this proceeding. He also represented her in the proceeding below. He was not the original attorney in the earlier proceedings and came aboard to represent Diane Miller just prior to the hearing.

8. On appeal the appellant's arguments are due process or procedural arguments. The appellant argues the Exhibits, particularly Exhibit 1 was never admitted and, therefore, could not be relied upon by the Director in reaching a decision in this matter. Under those circumstances, the appellant argues that there is no record that the appellant received the appropriate notices and orders and hearing information. The second main argument was that the oath was not properly administered to witnesses and, therefore, the testimony was not properly sworn. Under this argument, nothing testified to by the various parties would be admissible.

8. Section 1.3.4 provides the definitions of "unfit or abandoned structure":

> "(22) Unfit or Abandoned Structure: Any structure, which has been damaged by fire, weather, earth movement, or other causes, and which is not fit for occupancy, and has been abandoned or unoccupied by lawful tenants for a period of 90 days; or where the cost of repair exceeds the value of the structure once repaired; or such a damaged structure whose owner shows no intention of completing or making substantial progress on completing such repairs within 90 days.
>
> Included within this definition shall be any dwellings which are unfit for human habitation, and buildings, structures, and premises or portions thereof which are unfit for other uses due to dilapidation, disrepair, structural defects, defects increasing the hazards of fire, accidents, or other calamities, inadequate ventilation and uncleanliness, inadequate light or sanitary facilities, inadequate drainage, overcrowding, or due to other conditions which are inimical to the health and welfare of the residents of the City of Renton. (Ord. 5221, 9-11-2006)"

9. The record below established the costs of repair as exceeding the statutory values.

10. The director admitted Exhibits 1, 2 and 3 into the record. (At Page 64 of the transcript.)

11. After some introductory remarks and near the beginning of the proceeding the Director administered the affirmation:

> "At this time, I ask all parties who wish to testify to raise their right hand and take the following affirmation. Do you and each of you affirm the facts you are about to give in the matter now heard are the truth? If so, answer 'I do.'" (At Page 4 of the transcript.)

CONCLUSIONS:

1. The appellant has the burden of demonstrating that the decision of the City Official was either in error, or was otherwise contrary to law or constitutional provisions, or was arbitrary and capricious (Section 4-8-110(E)(7)(b). The appellant has failed to demonstrate that the action of the Director should be reversed. The appeal is denied.

2. Arbitrary and capricious action has been defined as willful and unreasoning action in disregard of the facts and circumstances. A decision, when exercised honestly and upon due consideration of the facts and circumstances, is not arbitrary or capricious (Northern Pacific Transport Co. v Washington Utilities and Transportation Commission, 69 Wn. 2d 472, 478 (1966).

3. An action is likewise clearly erroneous when, although there is evidence to support it, the reviewing body, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. (Ancheta v Daly, 77 Wn. 2d 255, 259 (1969). An appellant body should not necessarily substitute its judgment for the underlying agency with expertise in a matter unless appropriate.

4. The appellant argues that the Director administered the oath to all potential witnesses at the beginning of the hearing rather than administering the oath to each individual witness as they testified. The appellant cites RMC 1-3-5(F)(2): "Any party wishing to testify shall be sworn on oath.: and then noted that the hearings are to be governed by the civil rules of superior court. The objection was there was no way to determine if any particular witness actually took the oath before testifying. Washington Law and Practice, Vol. 5A, Section 603.1, pp 359-360 states:

> "Before testifying, a witness must declare that he or she will testify truthfully. The declaration must be by oath or affirmation calculated to awaken the witness's conscience and to impress upon the witness the duty to tell the truth" ... "If the court inadvertently fails to administer an oath, the opposing party should object and request that the oath be administered. In the absence of such an objection, the error is waived."

Taken together those phrases would appear to remove an objection by the appellant to the manner in which the oath was administered in this case. The first reference does not require individual oath-taking - it merely says that "before testifying, a witness must declare that he or she will testify truthfully." Administering an oath to the assembled witnesses would seem to provide the same objective - "to awaken the witness's conscience and impress upon the witness the duty to tell the truth." The second reference appears to remove the doubt that maybe one or more of the witnesses arrived after the group oath was administered. The appellant was not heard to object until filling the appeal. The appellant should have objected to the "group oath" procedure but failed to do so. The error, failure to administer the oath, if it occurred, would be waived by the failure to object to it in a timely fashion. In addition, there is no evidence that any particular witness failed to take an oath to tell the truth.

5. The appellant argues that Exhibit 1 was never admitted and, therefore, could not be considered. If the exhibit were not admitted, then the argument goes, there was no evidence that the "complaint was personally served..." (Page 2, Brief of Defendant). At Page 64 of the transcript of the hearing the Director admitted Exhibits 1, 2 and 3 into the record. In any event, it is quite evident that the appellant, Diane Miller, had notice of the hearing. She hired an attorney to take up matters with the City and represent her and then replaced that attorney with the current attorney, Mr. Davis. The current attorney

was present at the hearing before the Director demonstrating the appellant was appropriately notified even if appellant, herself, did not attend. Her husband and co-owner of the property was also in attendance at the hearing and testified.

6. This office can find no meaningful substance to the appellant's objection to either the record and its exhibits or the possible failure to individually administer oaths to witnesses. The appellant apparently changed attorneys very shortly before the hearing but herself had adequate notice of the proceeding. The materials were available for review by the appellant or her attorney in a normal manner and the only prejudice is that the last attorney hired may not have had as much time as he would have preferred. The materials were referred to at the hearing and there was no substantive objection as they were testified about by various witnesses. It is disingenuous to now argue that no argument was made against those exhibits because Mr. Davis did not believe they were part of the record. Any defect in their admission was rectified by the Director at the end of the hearing. The appellant did not object to the oath being administered to the entire assembly when it occurred, nor did the appellant object when any individual witness testified that the oath "ceremony" was defective. Modern Courts have determined that rules should not be thrown up as impediments to reaching a fair hearing. They generally allow amended pleadings, new witnesses and similar deviations that allow a fair hearing. The appellant's reliance on such formalities is misplaced since the lower appellate body should have been given a chance to "fix" any mistakes that may have occurred as opposed to bringing out the technical guns in this appeal.

7. This office subscribes to the arguments in the City's brief - even if the rules of procedure for Court are applicable to oaths, the court rules allow the testimony if there is no objection at the time it was offered. It is late for the appellant to play the "oath card" when it should have been raised below. Similarly, the record consists of the exhibits as entered into the record by the Director as they were part of the entire file and always available for inspection by an attorney, if not this attorney, representing the appellant.

8. With those procedural issues dispensed with, there is the merit of the Director's Decision. The record demonstrates that the residence is very badly deteriorated. There are holes in the roof and floor. The interior walls and supporting structures are rotting. Walls are open and old pipes and wiring are exposed. The building presents a hazard to those who would enter it. The period this building has been in this state exceeds 90 days. The building is "unfit" by definition and that is what the Director found. The definition does not confine itself to one jurisdiction or another - that is City or County. The building has been in a serious state of disrepair in both jurisdictions for a long time, exceeding 90 days. The evidence, both photographs and descriptions show a building that declined over a long period of time. The decision is clearly correct. This single-family residence is unfit and the appellant admitted as much at the appeal hearing while possibly using different phrasing. Experts provided evidence that it was in such a state of disrepair that costs of repair exceed the statutory limits.

9. The appellant was given a full opportunity to refute the City's allegations about the nature of the residence. The Director found the residence "unfit" after appropriate deliberation.

10. The decision below should not be reversed without a clear showing that the decision is clearly erroneous or arbitrary and capricious. This office has found that the decision below was clearly supported by the facts and the decision below should not be reversed or modified.

DECISION:

The decision is affirmed and the appeal is denied.

ORDERED THIS 17th day of December 2009.

FRED J. KAUFMAN
HEARING EXAMINER

Pursuant to Title IV, Chapter 8, Section 100Gof the City's Code, **request for reconsideration must be filed in writing on or before 5:00 p.m., December 31, 2009**. Any aggrieved person feeling that the decision of the Examiner is ambiguous or based on erroneous procedure, errors of law or fact, error in judgment, or the discovery of new evidence which could not be reasonably available at the prior hearing may make a written request for a review by the Examiner within fourteen (14) days from the date of the Examiner's decision. This request shall set forth the specific ambiguities or errors discovered by such appellant, and the Examiner may, after review of the record, take further action as he deems proper.

Owner has the right to petition the superior court of King County for appropriate relief within 30 days after the order becomes final.

If the Examiner's Recommendation or Decision contains the requirement for Restrictive Covenants, the executed Covenants will be required prior to approval by City Council or final processing of the file. You may contact this office for information on formatting covenants.

The Appearance of Fairness Doctrine provides that no ex parte (private one-on-one) communications may occur concerning pending land use decisions. This means that parties to a land use decision may not communicate in private with any decision-maker concerning the proposal. Decision-makers in the land use process include both the Hearing Examiner and members of the City Council.

All communications concerning the proposal must be made in public. This public communication permits all interested parties to know the contents of the communication and would allow them to openly rebut the evidence. Any violation of this doctrine would result in the invalidation of the request by the Court.

The Doctrine applies not only to the initial public hearing but to all Requests for Reconsideration as well as Appeals to the City Council.